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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41566

PONDEROSA FIBERS OF AMERICA, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF FULTRAN, INC.

Decided: April 10, 1998

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, in Fultran, Inc. v. Ponderosa Fibers of America, Inc., Chapter 7, 92 B 21492, No. 93 A 01319. The court proceeding was instituted by Fultran, Inc. (Fultran or respondent), a former motor common and contract carrier,[2] to collect undercharges from Ponderosa Fibers of America, Inc. (Ponderosa or petitioner). Fultran seeks undercharges of $210,029.41 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 1,160 shipments of recycled paper in pulp form between December 27,

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

[2] Prior to filing for bankruptcy, Fultran was an Illinois corporation providing nationwide transportation services subject to the jurisdiction of the ICC. Fultran ceased doing business on March 12, 1992.

1989, and March 18, 1992. The shipments were transported from Ponderosa's facility in Augusta, GA, to the facilities of various ocean carriers located at Savannah, GA, for subsequent movement in foreign commerce. By order dated February 27, 1995, the court stayed the proceeding pending ICC resolution of the issues raised.[3]

Pursuant to the court order, Ponderosa, on April 13, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of tariff filing exemption, unreasonable practice, and rate reasonableness. By decision served April 24, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on July 21, 1995. Fultran filed its response on September 20, 1995, and Ponderosa submitted its rebuttal on October 9, 1995.

Ponderosa contends that the commodity shipped was a recyclable material under 49 U.S.C. 10733, and thus not subject to the general rule that a carrier must charge only its filed tariff rate. Similarly, petitioner maintains that respondent's claims are invalid in view of 49 U.S.C. 10701(f)(9)(C), section(2)(a) of the NRA, which provides that shippers of recyclable materials are not liable for the payment of undercharge claims. Alternatively, petitioner argues that respondent's attempt to collect additional freight charges constitutes an unreasonable practice under section 2(e) of the NRA, and that the rates respondent seeks to assess are unreasonable.

Ponderosa supports its argument with affidavits from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner, and Edward Sokolowsky, Ponderosa's Vice President of Administration, an individual with personal knowledge of the transactions involved in this proceeding.[4] Both Mr. Bange and Mr. Sokolowsky contend that the goods shipped by the petitioner are recyclable goods exempt from tariff filing requirements and the filed rate doctrine. Mr. Bange also maintains that Fultran's efforts to collect undercharges here constitute an unreasonable practice under the NRA.

Mr. Bange conducted an audit and analysis of the claims of the respondent. According to Mr. Bange, nearly all of respondent's original freight bills assessed a flat rate of $300.00 or $332.00 for the transportation services rendered. Included among the attachments to Mr. Bange's affidavit are original freight bills, bills of lading, and other shipping documents for 10 sample shipments in

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[3] The court granted Ponderosa's motion to stay and to refer all issues raised to the ICC, including, but not limited to, whether the shipments are exempt from tariff filing requirements, whether Fultran's collection efforts constitute an unreasonable practice, and whether the rates Fultran now seeks to charge are unreasonable.

[4] Mr. Sokolowsky's affidavit, originally submitted in the underlying court proceeding, was attached both as Exhibit E to Mr. Bange's affidavit and as a separate exhibit to Ponderosa's opening statement.

which flat charges of $332.00 were assessed (Exhibit A);[5] a copy of the original court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number together with the original billing date, the originally assessed charge, the revised freight charge, and the balance due amount claimed (Exhibit C);[6] and a copy of a letter from Fultran's agent to Ponderosa, dated August 2, 1991, quoting per load round trip container rates for Augusta-Savannah movements of $332.00 (Exhibit D).[7]

Mr. Sokolowsky asserts that Fultran originally billed Ponderosa in accordance with the rates agreed upon by the parties, that Ponderosa tendered the subject shipments to Fultran in reliance upon the negotiated rates, and that the originally assessed charges were paid in full by Ponderosa. Mr. Sokolowsky states that during the relevant time period Ponderosa utilized the services of numerous other motor carriers and that the original rates offered by Fultran were competitive with those of the other carriers. He maintains that Ponderosa would never have used Fultran at the rates currently being sought because a lower cost service was available from numerous other carriers.

Fultran maintains that the subject shipments consisted of paper pulp that did not constitute "recyclable materials" as defined by 49 U.S.C. 10733 and thus are not exempt from the requirements of the filed rate doctrine or subject to 49 U.S.C. 10701(f)(9). Respondent argues that petitioner has failed to satisfy the statutory criteria required to qualify for the recyclable materials exceptions and, accordingly, it is obligated to assess the applicable filed rate for the subject shipments. Fultran asserts that the applicable tariff is ICC Freight Tariff 425, under which per shipment rates ranging from $396.76 to $527.95, rather than the originally charged $300 to $332 per shipment, should be assessed. Respondent further contends that the petitioner has failed to meet the requirements of the "unreasonable practice" defense.[8]

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[5] Three of the sample freight bills contain assessments for detention or fuel charges in addition to the $332.00 flat rate.

[6] The final page of Exhibit C contains the totals for the individually listed shipments, including the principal amount sought in the complaint based on respondent's asserted filed tariff rate.

[7] The quoted rate per load was based on a line haul charge of $300.00, a permit charge of $20.00, and a wire charge for the permit of $12.00.

[8] Respondent also argues that it is questionable whether the "unreasonable practice" defense of the NRA is even available where the carrier has filed for bankruptcy protection. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as respondent. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir, 1995); In re Transcon Lines, 58 F.3d

(continued...)

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.[9]

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[10]

It is undisputed that Fultran no longer transports property. Accordingly, we may proceed to determine whether Fultran's attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

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[8](...continued)
1432 (9th Cir. 1995), cert denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

[9] Although it appears to us that the commodity at issue here may well be a recyclable commodity that fits within the exemption of 49 U.S.C. 10701(f)(9)(C), a determination under that provision is unnecessary because it is so clear that Ponderosa must prevail under section 2(e).

[10] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked as to all 1,160 shipments at issue in this proceeding, including the shipments that were transported after September 30, 1990.

Here, petitioner has submitted sample copies of 10 original freight bills issued by respondent indicating that petitioner was assessed a flat charge of $332.00 for each of the sample shipments. The record also includes a detailed listing of all of the subject shipments indicating that the vast majority of these shipments were originally assessed a flat rate of $300.00 or $332.00, as well as an August 2, 1991 letter from Fultran's agent to Ponderosa quoting per load round trip container rates for Augusta-Savannah movements of $332.00 per load. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.-- Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H 89-2379 (S.D. Tex. March 31, 1997) (finding that the written evidence need not include the original freight bills, or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of flat rates of $300.00 and $332.00, rates that conform with the flat rate quoted in the August 2, 1991 letter from the Fultran agent, confirm the testimony of Mr. Sokolowsky, and reflect the existence of a negotiated rate.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that Ponderosa was offered a negotiated rate by Fultran; that Ponderosa, reasonably relying on the offered rate, tendered the subject traffic to Fultran; that the negotiated rate was billed and collected by Fultran; and that Fultran now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Fultran to attempt to collect undercharges from Ponderosa for transporting the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable Erwin I. Katz
United States Bankruptcy Court for the
Northern District of Illinois,
Eastern Division
Everett McKinley Dirksen Building
210 South Dearborn Street
Chicago, IL 60604

Re: Chapter 7, 92 B 21492,
No. 93 A 01319

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary